

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA

AMERICAN HIGH, INC.	)	AB-6540
dba Society Billiards Cafe	)	
1051 Garnet Avenue	)	File: 41-292339
San Diego, CA 92109	)	Reg: 94007379
Appellant/Applicant,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Alan S. Meth
JERRY SANDERS, Chief of Police	)	
San Diego Police Department	)	Date and Place of the
Respondent/Protestant, and	)	Appeals Board Hearing:
	)	January 11, 1996
DEPARTMENT OF ALCOHOLIC	)	Los Angeles, CA
BEVERAGE CONTROL,	)	
Respondent.	)	
_____	)	

American High, Inc., doing business as Society Billiards Cafe (appellant), appealed from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied appellant's petition to expand its premises to include a sidewalk cafe on the grounds that expansion would tend to aggravate an existing police problem, contrary to the general public welfare and morals provisions of the California Constitution, Article XX, §22, unless four additional conditions were placed on the license, pursuant to

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<sup>1</sup>The decision of the department dated May 22, 1995 is set forth in the appendix.

Business and Professions Code §§23958 and 23800.

Appearances on appeal included appellant American High, Inc., appearing through its counsel, John W. Millar and Evan Mead Stone; the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathan Logan; and protestant Jerry Sanders, Chief of Police of the San Diego Police Department.

### FACTS AND PROCEDURAL HISTORY

Appellant's license was issued April 22, 1992. Appellant operated a billiard parlor with 15 billiard tables on two floors. Appellant offered an extensive list of beers and wines from 15 countries, as well as gourmet pizzas, salads, appetizers, sandwiches, and desserts. The operation was described as "upscale" due to the high-quality billiard tables, the food and drink offerings, and the higher-than-usual prices.<sup>2</sup>

Thereafter, appellant requested that its license be expanded to allow the addition of a sidewalk cafe where ten tables would be placed just outside the premises with an entrance to the outside cafe only from the premises. The department denied the request.

An administrative hearing was held on October 25, 1994, at which time oral and documentary evidence was received. Following the hearing, the administrative law

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<sup>2</sup>The department's finding VIII sets forth the facts that the premises was "upscale" and appealed to various business groups for meetings; that the premises was an asset to the community; and that the local planning group (organizations which the appeals board has found most often are adverse to admission of more alcoholic beverage outlets) was in favor of and voted to support the application for the cafe.

judge (ALJ) issued his proposed decision which determined that issuance of the applied-for license would not interfere with the quiet enjoyment of their property by residents of the area, but would tend to aggravate an existing police problem. The ALJ added a condition that limited the hours of sale of alcoholic beverages in the sidewalk cafe area.

The department thereafter rejected the ALJ's proposed decision pursuant to Government Code §11517(c), which allows the department to reject a proposed decision in whole or in part. The essential difference between the proposed decision and the department's decision was that the proposed decision added one condition limiting the time alcoholic beverages could be sold and consumed in the sidewalk cafe. The department's decision added three other conditions. Thereafter, appellant filed a timely notice of appeal.

In its appeal, appellant raised the following issues: (1) the department exceeded its authority in imposing the four conditions, and (2) the crucial findings of the department supportive of the denial of the expansion request due to police problems were not supported by substantial evidence.

#### DISCUSSION

It is the department, and not the appeals board, that is authorized by the California Constitution to exercise its discretion whether to deny an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the granting of such license would be contrary to public welfare or morals.

The scope of the appeals board's review is limited by the California Constitution,

by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings. The appeals board is also authorized to determine whether the department has proceeded in the manner required by law, or proceeded in excess of its jurisdiction (or without jurisdiction).<sup>3</sup>

"Substantial evidence" as referenced above is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647).

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925). Appellate review does not "...resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658).

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<sup>3</sup>The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

I

Appellant contended that the department exceeded its authority in imposing the four conditions.

The authority of the department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800(a) is that "...if grounds exists for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the department may grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"<sup>4</sup> in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The four conditions limited the sale and consumption of alcoholic beverages in the patio area to 10 p.m. daily; demanded that an employee be present in the sidewalk cafe area at all times when sales and consumption of alcoholic beverages were allowed; demanded that the area in and around the outside cafe be policed regularly by employees; and mandated that the sale of alcoholic beverages be incidental to the sale of food.

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<sup>4</sup>See Webster's Third New International Dictionary, 1986, page 1524.

The department's determinations that the issuance of an unconditioned license would tend to aggravate a law enforcement problem come within the statutes.

Therefore, the department had the authority to impose the four conditions, provided the conditions were reasonably linked to the problem of tending to create a law enforcement problem.

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## II

Appellant contended that the crucial findings supportive of the denial of the expansion request due to police problems were not supported by substantial evidence.

Appellant conceded that conditions 19, 20, and 21 are reasonably connected to the area of law enforcement problems. Condition 19 mandated regular policing by employees of the area around the patio, thereby controlling unacceptable behavior by patrons or passersby. Condition 20 mandated that the sale of alcoholic beverages be incidental to the sale of food, thereby excluding bar-hopping youths. Condition 21 mandated that an employee be present at all times when alcoholic beverages were being consumed in the patio, thereby self-policing the small patio area. Therefore, the review will proceed as to condition 18 only as to whether the condition has a reasonable connection to law enforcement problems.

Determination of issues II denying the expansion was supported by findings VI, VII, VIII, and IX.

Finding VI concerned census tract 79.01, and listed various crimes and arrests within that census tract. There was no evidence as to the size or extent of the borders

of the tract or the location of the premises within that tract.

Finding VII appears to detail the testimony of Sergeant Anthony Johnson of the San Diego Police Department, who attributed the crime upsurge to patrons walking from one bar to another during the day, but mainly at night. Johnson considered appellant's operation an "upscale" premises, but was concerned about the interplay between appellant's patrons and sidewalk pedestrians.

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Finding VIII detailed appellant's supporters as set forth in footnote 2.

Finding IX appears to detail the ALJ's rationale for his proposed decision.

Appellant argued that the statistics on crime within the area were of limited use. The 1993 crime statistics within the concerned census tract showed 1,625 crimes and arrests, or 267.7% higher listed crimes and arrests than the city-wide average. Within 0.1 mile around the premises, there were 210 crimes reported from September 1, 1993 to September 1, 1994.

The problem with census tract statistics is that it is difficult to connect the crimes and arrests with a particular location. These type of statistics are designed for supporting rule 61.3 (a rule of the department which goes to the question of an undue concentration of licenses within a particular area--an issue not part of the present matter) and have little value for showing police problems, not knowing the extent, size, or configuration of the census tract. Additionally, even the 0.1 mile radius from the premises in a beach town like the one in question is a very large area to which the statistics, by themselves, have difficulty in pinpointing the problem with fair precision:

that the issuance of this license would adversely impact the area.

The census tract had 654 alcohol arrests, or 790.6%, over the city-wide average. While the almost 800% increase in alcohol arrests over the city-wide area seems unacceptable, the truth is that this is a beach town, and the statistics included the nearby beach in the statistics. Common knowledge, from the many reports of beach town problems in cases which have come before this board, is that the closer the proximity to the actual beach, the greater the escalation of alcoholic abuse.

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Sergeant Johnson testified that he and a police team had been assigned to a very small stretch of Garnet Avenue to combat problems that had arisen in that area. Johnson stated that when he left the area in 1987, the area was not a police problem, but when he returned in 1992, the area had gotten "totally out of hand." People apparently migrated up and down the street (700 block to 1200 block) and "bar hopped." According to Johnson, there has been a "tremendous increase over the last two summers" in such activity. Responding to a question whether alcoholic beverage availability was a factor in the problems, Johnson stated that "Alcohol affects people's behavior. They drink, they walk from bar to bar. It's a crowded kind of out-of-control overall atmosphere and encourages violent behavior." Johnson stated that groups of youths begin to congregate from 9 p.m. to 10 p.m. The sergeant offered his opinion that such an expansion would most likely affect police problems [R.T. 95-98, 106].<sup>5</sup>

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<sup>5</sup>The testimony of Johnson was that "...it introduces an element of alcohol availability onto the sidewalk where we have a large crowd walking back and forth. It's very easy to pass alcohol back and forth over the rail. And I would say it

Apparently a video tape was played at the hearing and Sergeant Johnson explained that it showed the nighttime crowd on weekends. The video showed the narrowing of a sidewalk by a unlicensed outdoor coffee house enclosed by a railing. It narrowed the crowd; thus, as stated by the sergeant, it was an example of the kind of problem that that type of physical structure could create. Johnson then testified that the crowds appear to be primarily young, military and college age, and then opined that "...it's going to increase crime problems that we have to deal with. And our manpower is already stretched to the limit dealing with what's there" [R.T. 102-103]. The video depicts the area and the crowds, but added little to the present review.

Therefore, the issue is not the creation of the sidewalk cafe, a reality apparently approved by the local governing body, but whether the serving of alcoholic beverages after 10 p.m. would aggravate the current police problem.

The statistics that the department provided are so general as to be de minimis in factual value. The police officers' testimony was to the large crowds of youths who apparently arrive around 9 to 10 p.m. during the summer months and "bar hop." However, the evidence shows that appellants' premises and prices are "upscale" and tend not to involve bar-hopping youths.

The statistics of local crime categories also have little nexus to the question of what impact the selling and consumption of alcoholic beverages after 10 p.m. would

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would almost be impossible for employees to monitor. It also creates an opportunity for people walking by to interact with people that are inside the business [patio] drinking. It also acts as a funnel, and it narrows down a portion of the sidewalk that would encourage people...to step out into the street or to congregate and cause other people to step out into the street" [R.T. 99].

have. With the department's stringent conditions of employee control and monitoring, the evidence of adverse impact involving consumption after 10 p.m. is not substantial.

### CONCLUSION

We conclude there is no substantial evidence that service and consumption of alcoholic beverages in the patio after 10 p.m., with the monitoring conditions imposed, would tend to aggravate a law enforcement problem. The record supports the proposition that there are severe law enforcement problems in this beach town, a well-known factor in most areas in California, especially in beach towns. However, in order to properly deny a license in cases such as this, there must be a realistic connection between the crime problems in the community and the service of alcoholic beverages after 10 p.m. in this particular premises. The evidence did not indicate that such alcoholic beverages could cause a "spill-over" into the community that some on-sale and off-sale premises create. The record is full of innuendos, which we consider speculation, but speculation cannot take the place of fact and reasonable inferences. We do not find that the record supports the imposition of condition 18, as appellants have well proven that this premises, an island of properly-managed alcoholic beverage service and monitored consumption, is an "asset to the neighborhood," as the department clearly set forth in its decision's finding VIII.

The decision of the department is reversed and remanded with instructions to consider why this license should not be granted with conditions 19, 20, and 21 affixed,

and in accordance with the views expressed herein.<sup>6</sup>

RAY T. BLAIR, JR., CHAIRMAN  
JOHN B. TSU, MEMBER  
BEN DAVIDIAN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>6</sup>This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.